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Attorneys for Defendant
DOLLAR TREE STORES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KASSONDRA BAAS and KELLY LOFQUIST, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOLLAR TREE STORES, INC.,

Defendant.

CASE NO. C 07-03108

DEFENDANT DOLLAR TREE STORES, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS AND/OR STRIKE PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: August 24, 2007
TIME: 9:00 a.m.
DEPT: Courtroom 2, 17th Floor
JUDGE: Hon. Jeffrey S. White

COMPLAINT FILED: June 13, 2007
TRIAL DATE: No date set.

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 24, 2007, in Courtroom 2 of the United States District Court, Northern District of California, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, at 9:30 a.m., or as soon thereafter as counsel may be heard, Defendant Dollar Tree Stores, Inc. ("Dollar Tree") will ask that, pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(f),[1] the Court dismiss and/or strike the Complaint filed on June 13, 2007 by Plaintiffs Kassondra Baas and Kelly Lofquist ("Plaintiffs").

The motion will be based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the argument of counsel, the pleadings and papers filed herein, and upon any other matters properly considered by the Court.

DATED: July 9, 2007

Respectfully submitted,

KAUFF McCLAIN & McGUIRE LLP

By: /S/
ALEX HERNAEZ

Attorneys for Defendant
DOLLAR TREE STORES, INC.

[1] Citation to the Federal Rules of Civil Procedure will be "Rule __." Citation to the Local Rules for the Northern District of California will be to "Local Rule __."

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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELIEF REQUESTED

Dollar Tree respectfully requests that the Court award it the following relief:

Pursuant to Rule 12(b)(6), that the Court dismiss the Complaint, which is grounded entirely in fraud, for failure to comply with Rule 9(b)'s specificity requirement;

Pursuant to Rule 12(b)(6) and Rule 12(f), that the Court dismiss and/or strike the Complaint's "Class Action Allegations" because they are both vague and logically impossible;

Pursuant to Rule 12(b)(6) and Rule 12(f), that the Court dismiss and/or strike Plaintiff's jurisdictional reliance on the Class Action Fairness Act of 2005 ("CAFA")[2] because the Complaint does not allege the required elements;

Pursuant to Rule 12(b)(6), that the Court dismiss Count VIII of the Complaint ("Request For Preliminary And Permanent Injunction And Other Equitable Relief") with prejudice because it does not state a claim for which relief may be granted;

Pursuant to Rule 12(b)(6), that the Court dismiss the state-law claims (Counts I through VIII) because Plaintiffs cannot simultaneously maintain an "opt-in" class under the FLSA and an "opt-out" class under Rule 23; and,

Pursuant to Rule 12(f), that the Court strike allegations in the Complaint specifically identified below.

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[2] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in various sections of Title 28 of the United States Code).

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II. RELEVANT FACTS

The Complaint is styled as a putative class action and it alleges nine causes of action: Failure to Pay Wages Due at Designated Times (Count I); Failure to Pay Overtime Under California Law (Count II); Failure to Pay All Unpaid Wages at Time of Termination (Count III); Failure to Provide Accurate Itemized Wage Statements (Count IV); Unfair Competition (Count V); Fraud and Deceit (Count VI); Unjust Enrichment / Constructive Trust (Count VII); Request For Preliminary And Permanent Injunction and Other Equitable Relief (Count VIII); and Failure to Pay Overtime Under the Fair Labor Standards Act ("FLSA").

The Complaint's nine counts are all based upon a common theory—that Dollar Tree somehow systematically manipulated its computerized payroll system to reduce wages or avoid overtime liability. *Compl.*, ¶¶ 19-24. And, as discussed more fully below, the counts suffer from a common defect—at best and crediting the allegations in the Complaint,[3] Plaintiffs can allege facts related to a single District Manager, Mr. Rick Tellstrom, at a single Dollar Tree store in Sonoma County, California. It is the only Dollar Tree store at which Plaintiffs have ever worked. *Compl.*, ¶¶ 13-15. Indeed, Plaintiffs admit that they have no evidence of any other wrongdoing anywhere else in the state:

> The computer program tracks changes made to employee hours and who makes such changes. With that information, the parties will be able to more fully discover who made the electric time card changes and, through depositions of those individuals, it will become apparent which of the managing agents of Defendant DOLLAR TREE, in addition to Mr. Tellstrom, were specifically involved in directing these fraudulent changes.

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[3] Dollar Tree specifically disputes this allegation and all other allegations regarding pay manipulation.

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Compl., ¶ 70.

Although Plaintiffs admit that their allegations are limited to the alleged conduct of one District Manager, Plaintiffs nonetheless attempt to allege a state-wide class action grounded in fraud, using only omission, innuendo, and the phrase "on information and belief." They cannot. Rather, the fraud allegations must be alleged specifically under Rule 9(b) and the class action allegations must be sufficient to afford Dollar Tree fair notice.

III. ARGUMENT

"A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the pleadings." *Silvas v. E*Trade Mortg. Corp.*, 421 F. Supp. 2d 1315, *3 (S.D. Cal. 2006). "Dismissal is appropriate where the Complaint lacks a cognizable legal theory." *Id.* Although courts generally assume the facts alleged in a complaint are true, courts do not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *West Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see also In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993) ("Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss.").

Pursuant to Rule 12(f), "the court may order stricken from any pleading any "redundant, immaterial, impertinent, or scandalous matter." The Ninth Circuit defines "immaterial matter" as "that which has no essential or important relationship to the claim for relief . . . ." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (internal quotation marks and citation omitted), *rev'd on other grounds,* 510 U.S. 517 (1994). "Impertinent" matter "consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* Thus, a Rule 12(f) motion should be granted where "it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." *White v. Hanson*, 2005 U.S. Dist. LEXIS 43989, at *14 (N.D. Cal. July 28, 2005) (citing *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1179 (N.D. Cal. 2001)). The Court also may strike sections of the Complaint when the damages sought "are not recoverable as a matter of law." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479 (C. D.

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Cal. 1996) (citing *Tapley v. Lockwood Green Eng'rs*, Inc., 502 F.2d 559, 560 (8th Cir. 1974)).

A. The Complaint Should Be Dismissed Because Plaintiffs' Allegations Of Fraud, Which Are Incorporated Throughout The Complaint, Have Not Been Alleged With The Specificity Required By Rule 9(b).

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy only the "notice pleading" requirements of Rule 8(a)(2). *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). However, where, as here, "a complaint includes allegations of fraud, Federal Rule of Civil Procedure 9(b) requires more specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal citations and quotations omitted).

"To comply with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* Accordingly, "Plaintiff[s] must attribute false or misleading statements to a particular defendant and must set forth specific descriptions of the fraudulent representation. Allegations which are vague and conclusory are insufficient to satisfy Rule 9." *Campbell v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 12550 (C.D. Cal. 1998); *see also Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) (allegations must identify "the who, what, when, where, and how" of the fraud).

Moreover, where the defendant is a corporation, the complaint should identify the particular agents, employees or officers accused of participating in the fraud. *Swartz*, 476 F.3d at 764; *see also Herndon v. Scientific Applications Int'l Corp.*, 2006 U.S. Dist. LEXIS 79520 (S.D. Cal. 2006) (dismissing complaint where, *inter alia*, plaintiff did not identify the individuals who executed or negotiated the allegedly fraudulent contracts, billings, or certifications); *United States ex rel. Man Tai Lam v. Tenet Healthcare Corp.*, 2006 U.S. Dist. LEXIS 95946 (W. D. Tex. 2006) (dismissing fraud

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claim against hospital where plaintiff failed to specifically identify the physicians accused of fraud).

Here, Plaintiffs allege that Dollar Tree engaged in "reverse time clock fraud," which they define as a situation where "the employer falsifies the hours worked by the employee in order to pay the employee less." *See Compl.*, ¶ 23. This alleged state-wide scheme, says Plaintiffs, was perpetrated by certain unnamed individuals, at certain unspecified times, against certain unnamed employees as well as the federal government. *See Compl.*, ¶¶ 19-24. Indeed, the only person identified in the Complaint is Mr. Tellstrom, who Plaintiffs say "on information and belief" was somehow involved in the asserted fraud. These allegations, which Plaintiffs rely on to support each individual Count of the Complaint, *e.g., Compl.*, ¶¶ 25, 33, 39, 45, 52, 66, 76, 80 & 84, are insufficient under Rule 9(b).

For example, in *United States ex rel. Brinlee v. AECOM Gov't Servs.*, 2007 U.S. Dist. LEXIS 9794 *10 (W.D. La. 2007), the complaint described in "general terms" a scheme that included "time card fraud, in which employees of AECOM were paid by the government while working for private companies." AECOM filed a motion pursuant to Rule 9(b) arguing that "the complaint does not identify particulars regarding any false or fraudulent submissions for payment to the government" and that "there is no indication of when AECOM allegedly made false claims to the government, who made such a claim on its behalf, or what the contents of any such claim may have been." *Id.* at 11.

In sustaining AECOM's motion, the Court focused on the difference between pleading the theoretical existence of a scheme and setting out specific facts showing the scheme's actual existence:

> Although there is no question plaintiff's complaint is detailed regarding the process allegedly undertaken by AECOM and its employees, it fails to make adequate factual allegations that AECOM committed fraud against the government. The plaintiff alleges no specific facts in support of his general

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> allegation that AECOM submitted false claims. Instead, the plaintiff makes relatively detailed statements about the alleged schemes carried out by AECOM and then ends the description of each scheme with a general summation that typically states that the fraudulent invoices were submitted to AECOM so that AECOM could bill the government. The plaintiff has failed to identify a single claim that was actually submitted pursuant to the allegedly fraudulent schemes identified in the Amended Complaint. Essentially, the plaintiff has set out the process by which defendants could have produced false claims, but provides no facts that this process did, in fact, result in the submission of false claims.

Id. at * 12.

The reasoning in *AECOM* is equally applicable here: while Plaintiffs have perhaps identified "a process allegedly undertaken by [Dollar Tree] and its employees" to commit "reverse time-clock fraud," they nonetheless fail to make any specific factual allegations establishing "that this process did, in fact, result in any actual" fraud. Hence, the Complaint should be dismissed in its entirety.

Regarding Mr. Tellstrom, who is identified with respect to Count VI (Fraud and Deceit), Plaintiffs allege, again using the watered-down "on information and belief" formula, that he directed store managers to participate in the fraud. *See Compl.*, ¶ 70. But, as with their other causes of action, Plaintiffs provide no further detail. In particular, the Complaint fails to identify any timeframe for this supposed participation or any details regarding who Mr. Tellstrom supposedly directed to participate. Indeed, far from providing factual detail, the Complaint actually concedes that Plaintiffs have no facts supporting their state-wide allegations. In ¶ 70, for example, Plaintiffs state that they must review a "computer program" in order to "more fully discover" whether or not a state-wide fraud actually occurred. Guesswork like this cannot form the basis of fraud claims under Rule 9 (b).

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In sum, Plaintiffs seek to support a state-wide class action lawsuit based on the factual allegation that a single District Manager told certain unspecified Store Managers to make unspecified changes to the time cards of unspecified employees. This is simply not enough. Rather, to avoid a subsequent dismissal with prejudice, the Court should require Plaintiffs to identify in their amended pleading: (1) the names of any employees participating in the alleged fraud; (2) any documents evidencing the alleged fraud;[4] (3) the names of any employee harmed by the alleged fraud; (4) the "time, place, and specific content" of any false representations; (5) any specific instances of the fraud being committed; and (6) any other facts known by Plaintiffs regarding the alleged fraud.

B. Plaintiffs' Class Action Allegations Must Be Dismissed Or Stricken Because They Are Hopelessly Vague And Logically Impossible.

Rule 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." To satisfy this requirement, the statement must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002) (internal citations omitted). It is true that the dismissal of class allegations is rare. *In re Wal-Mart Stores, Inc.*, 2007 U.S. Dist. LEXIS 41679 (N.D. Cal. 2007). However, the *Wal-Mart* decision does not preclude such action, and it remains true that dismissal is appropriate where, as here, the allegations are so vague as to deny Dollar Tree "fair notice." E.g., *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (class allegations may be disposed of at the pleading stage; whether to allow discovery is within the Court's discretion).[5]

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[4] *E.g., Behrman v. Allstate Life Ins. Co.*, 2005 U.S. Dist. LEXIS 7262 * 9 (S. D. Fla. 2005) (affirming dismissal of fraud claim where plaintiff failed to identify "the specified documents or oral representations in which such statements or omissions were allegedly made"); *see also Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)(affirming dismissal of fraud claim where plaintiff failed to "attach the [allegedly fraudulent] notices to her complaint or to any other filing in this case").

[5] *See also Palmer v. Combined Ins. Co. of Am.*, 2003 U.S. Dist. LEXIS 2534 at *5 (N.D. Ill. Aug. 29, 2003) ("[I]t is sometimes possible to determine from the pleadings alone [the Rule 23] requirements cannot possibly be met, and in such cases, striking class allegations before commencing discovery is appropriate.").

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There are two problems with Plaintiffs' class action allegations: the alleged class cannot possibly be correct and there are no facts pled establishing a class outside of Sonoma County, California. *See Compl.*, ¶¶ 1-11. Plaintiff asserts that the appropriate class is comprised of all Dollar Tree employees, both exempt and non-exempt:

> The proposed Class that Plaintiffs seek to represent is composed of current and former employees of Defendant Dollar Tree's stores within the State of California at any time within the last four years until the date of trial.

Compl., ¶ 2. This proposed class cannot be correct because it is in conflict with Plaintiffs' theory of the case—*i.e.*, that unnamed Dollar Tree employees manipulated payroll data to increase the company's revenue. *Compl.*, ¶¶ 20-24. However, this theory makes no sense regarding Dollar Tree employees who are exempt and not entitled to be paid overtime under either the FLSA or Wage Order No. 7. These individuals must be excluded from the class definition. The proposed class also fails because it does not exclude the part-time employees that will never qualify for overtime because of their limited hours. Because the proposed class, as defined by Plaintiffs themselves, cannot be correct, the class action allegations should be dismissed. *See O'Connor v. Boeing N.A., Inc.*, 197 F.R.D. 404, 416 (C.D. Cal. 2000) (To sustain a class action, it is imperative that the proposed class definition be "precise, objective and presently ascertainable."

In addition, the class definition fails because it purports to include employees throughout the State of California. Such ambition is not supported by the facts asserted. Plaintiffs worked at a single Dollar Tree store in Sonoma County California during a combined timeframe of October 2005 through February 2007. *Compl.*, ¶¶ 13-15. They identify a single person, their District Manager, Mr. Tellstrom, as having participated in the fraud. *Compl.*, ¶ 70. And, most importantly, they concede that they presently do not have any facts regarding anyone other than Mr. Tellstrom. *See id.*

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(referencing need to engage in extensive discovery). Crediting fully Plaintiffs allegations, it is apparent that, at most, they have information about what a single person did at a single store in Sonoma County. Upon this localized observation, they cannot launch a state-wide attack against Dollar Tree. More particularly, Plaintiffs have not stated any facts linking the alleged isolated incident to conduct that is state-wide in scope. And this Court need not accept mere conclusions, especially when Plaintiffs have admitted the absence of any additional facts. *Id.* Therefore, the class-action claims should be dismissed.

C. Plaintiffs' Allegations Regarding The Class Action Fairness Act Must Be Dismissed Because The Complaint Fails To State The Statutory Requirements.

The Complaint purports to rely upon CAFA. *See Compl.* at ¶¶ 1 & 11. CAFA provides in relevant part that the district courts have original jurisdiction over any class action, brought under state or federal law, in which (a) the number of members of all proposed plaintiff classes in the aggregate is at least 100; (b) any member of a class of plaintiffs is a citizen of a State different from any defendant; and (c) the aggregated claims of class members exceed the sum or value of $5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2)(A-C).

"[T]he party who invokes the jurisdiction of the court has the burden of establishing jurisdiction. Rule 8(a) requires the plaintiff to set forth in the complaint the factual support for jurisdiction." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1216 (11th Cir. 2007). Here, Plaintiffs cannot rely upon CAFA because they fail to allege that the proposed class is at least 100. *See Compl.* at ¶ 3 (alleging only that the class is "so numerous" that joinder is precluded). Moreover, Plaintiffs' allegation that their claims exceed the sum or value of $5,000,000 is unsupported by any articulated "factual support." Given that Plaintiffs have not alleged any specific number of class members, the court need not accept this conclusory allegation as correct. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) ("Nor is the court required to accept as

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true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").[6]

D. Count VIII Of The Complaint, A "Request For Preliminary And Permanent Injunction And Other Equitable Relief," Should Be Dismissed Because It Is A Remedy And Not A Cause Of Action.

Count VIII purports to set forth a cause of action for "Preliminary And Permanent Injunction And Other Equitable Relief." *Compl.*, ¶¶ 80-83. This Count should be dismissed because what Plaintiffs allege is a type of remedy and not a cause of action. Even if there were such a cause of action (and there is not), it would not satisfy basic pleading standards by failing to allege the requirements necessary to establish injunctive relief contained in Rule 65 and Local Rules 65 and 7-2. *See e.g., Givemepower Corp. v. Pace Compumetrics, Inc.*, 2007 U.S. Dist. LEXIS 20886, 18-19 (S.D. Cal. 2007) (setting forth the requirements for injunctive relief). Because Count VIII fails to allege these elements, it should be dismissed.

In addition, Count VIII is defective because it ignores Local Rule 65, which requires that a party obtain a preliminary injunction through noticed motion.

E. Plaintiffs' State Law Claims Must Be Dismissed Because They Cannot Simultaneously Maintain An "Opt-In" Class Under The FLSA And An "Opt-Out" Class Under Rule 23.

The Complaint purports to bring a class action pursuant to Rule 23 (*Compl.*, ¶ 1) together with a collective action under the FLSA, 29 U.S.C. § 216(b). *See Compl.*, ¶¶ 84-90. However, as this Court has explained, the class action procedures under Rule 23 are fundamentally different than the collective action procedures under the FLSA:

> FLSA and Rule 23 provide different means for participating in a class action: FLSA provides for participation on an opt-in basis (see § 216(b)), while Rule 23 requires that nonparticipating class members affirmatively opt out of the

[6] The Court would maintain federal question jurisdiction pursuant to 28 U.S.C. § 1331. *See e.g., (con't)*

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> suit (see FRCP 23(c)(1)(B)). In other words, the FLSA suit provides a means of participation for individuals who truly wish to join the suit, while requiring no action from those who do not wish to join. By contrast, a Rule 23 class requires that a potential class member take affirmative action not to be bound by the judgment.

Leuthold v. Destination Am., 224 F.R.D. 462, 469-470 (N.D. Cal. 2004).

Although there is a split of authority on this question,[7] some federal courts have found FLSA collective actions incompatible with Rule 23 class actions because of this difference:

> It is clear that Congress labored to create an opt-in scheme when it created Section 216(b) specifically to alleviate the fear that absent individuals would not have their rights litigated without their input or knowledge. To allow an Section 216(b) opt-in action to proceed accompanied by a Rule 23 opt-out state law class action claim would essentially nullify Congress's intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement. To so hold would be contrary to the clear path being blazed by our sister district court as well as the direction taken by some of our sister circuits.

Otto v. Pocono Health Sys., 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006); *see also La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir 1975) ("Rule 23 cannot be invoked to circumvent the consent requirement of the third sentence of FLSA § 16(b) which has unambiguously been incorporated into ADEA by its Section 7(b)."); *Kinney*

(Continued)
Count IX (alleging violations of the FLSA).

[7] The position advocated by Dollar Tree appears to be a minority one. E.g., *Kelley v. SBC, Inc.*, 1998 U.S. Dist. LEXIS 18643, 37-38 (N.D. Cal. 1998) ("The opt-in provisions of the FLSA do not act as a complete bar to class certification under Rule 23 where pendent State law claims are involved."); *see also Lindsay v. Gov't Emples. Ins. Co.*, 448 F.3d 414 (D.C. Cir. 2006).

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Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977)[8]; *Neary v. Metropolitan Prop. & Cas. Ins. Co.*, 472 F. Supp. 2d 247, 248 (D.Conn. 2007). Because § 216(b) conflicts with Rule 23, the Court should dismiss the state-law causes of action.

F. The Court Should Strike Certain Allegations From The Complaint Pursuant To Rule 12(f).

Dollar Tree asks that the Court strike from the Complaint the following specific allegations that, as a matter of law, cannot be used as a basis for recovery by Plaintiffs.

1. The Court Should Strike All References To Labor Code Section 2699 Et Seq. From The Prayer For Relief.

Plaintiffs' Prayer for Relief (the "Prayer") to the first and fourth causes of action seeks to recover civil penalties pursuant to California Labor Code Private Attorneys General Act of 2004 (Labor Code §§ 2698 *et seq.*) (the "PAGA") for alleged violations of Labor Code sections 204, 204(b) and 226. *See Compl.*, ¶¶ 26-31 (alleging violations of § 204 and § 204(b)); ¶¶ 46-51 (alleging violations of § 226); Prayer at ¶ 4 at p. 22:13 (referencing § 2699 *et seq.* in connection with the first cause of action) and ¶ 14 at p. 23 (same for fourth cause of action). To commence a civil action under the PAGA, however, Plaintiffs must first demonstrate compliance with the administrative exhaustion requirements of Labor Code § 2699.3(a)(1).[9] *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 376 (2005) ("Section 2699.3, subdivision (a), provides the administrative procedures that must be followed before an aggrieved employee may file a civil action to recover civil penalties under section 2699 for violations of any of the Labor Code provisions identified in section 2699.5").[10] This requirement is necessary to

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[8] Overruled on other grounds, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

[9] The administrative prerequisites to filing a lawsuit seeking civil penalties under Section 2699.3(a) include written notice to the employer and the Labor and Workforce Development Agency ("LWDA") of the specific Labor Code provisions the aggrieved employee believes were violated and either the receipt of notice by the employer and the employee from the LWDA that it does not intend to investigate or the lapse of time without such notice from the LWDA. Cal. Labor Code § 2699.3.

[10] §§ 204, 204b and 226 are among the Labor Code sections identified in § 2699.5. *See* § 2699.5.

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provide the LWDA with the opportunity to investigate alleged Labor Code violations. *See* Cal. Labor Code § 2699.3(a)(2)(B).

The Complaint fails utterly to plead compliance with the procedural filing requirements of § 2699.3(a). Therefore, the civil penalties Plaintiffs seek through § 2699 in their first and fourth causes of action will not be recoverable (*Caliber Bodyworks, Inc.*, 134 Cal. App. 4th at 376) and the Court should strike all references to § 2699 contained in the Prayer for Relief pursuant to Rule 12(f).

2. The Court Should Strike Certain Allegations From Plaintiffs' Fifth Cause Of Action For Unfair Competition.

"'[U]nder the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution.'" *Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 891, 893 (C.D. Cal. 2005) (citing *Korea Supply, Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1444-45 (2003) (further citations omitted). "[C]ompensatory damages are not available." *Id.* "An order for restitution is one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property . . . ." *Id.* (quoting *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 126-127 (2000). "The goal of restitution is to restore the status quo ante. *Id.*

Plaintiff's fifth cause of action (*see Compl.*, ¶¶ 52-65) alleges that Dollar Tree engaged in unfair competition and committed unfair business practices by allegedly failing to pay to Plaintiffs overtime wages (*id.*, ¶ 56 at p. 13:15-18) and by failing to issue accurate itemized wage statements (*see id.*, at p. 13:19-20). Rather than limit their claim to a request for injunctive or restitutionary relief, Plaintiffs reference sections 203 and 226.6 of the California Labor Code which impose statutory penalties upon employers failing to take certain actions.[11] *See id.*, ¶ 56. Moreover, Plaintiff's Prayer for Relief

[11] Plaintiffs' UCL Prayer for Relief seeks "such other and further relief as the Court may deem just and appropriate." *Compl.*, at Prayer (p. 24, ¶ 22). Plaintiffs thus arguably seek the imposition of the statutory penalties identified in Labor Code sections 203 and 226.6.

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("Prayer") seeks (a) a "temporary restraining order [and] a preliminary injunction . . . enjoining Defendant from failing to pay overtime wages, withholding taxes, matching funds, Social Security, Medicare, unemployment and workers' compensation premiums as required by law" (*id.* at p. 24, ¶ 20); and (b) "an order requiring Defendant to show cause, if any they have, why it should not be enjoined as set forth herein, during the pendency of this action" (Prayer at p. 24, ¶ 19). Each of these allegations and prayers for relief should be stricken from the Complaint pursuant to Rule 12(f) on the grounds that they exceed the relief allowable under the UCL, as described below.

a. The Court Should Strike References To California Labor Code Sections 203 And 226.6 Because Penalties Are Not Recoverable Under The UCL.

Plaintiffs' fifth claim for relief references California Labor Code §§ 203 and 226.6 which impose penalties upon employers who violate §§ 201 and 226(a), respectively.[12] *See Compl.*, ¶ 56 at p. 13:22. Plaintiffs may not recover the penalties described in §§ 203 and 226.6 because they are not restitutionary and are not recoverable under the UCL. *See Tomlinson v. Indymac Bank*, 359 F. Supp. 2d 891,894-895 (C.D. Cal. 2005) (holding that penalties are not available to private litigants in a UCL action).

Plaintiffs' reference to § 203 in the fifth cause of action (¶ 56 at p. 13:22) is improper under *Tomlinson* and should be stricken. In *Tomlinson*, Plaintiffs alleged violations of the FLSA and the UCL and sought to recover, among other things, the statutory penalties contained in § 203 through their UCL claim for relief. 359 F. Supp.2d at 893. The Court ruled that § 203 penalties are not recoverable under the UCL "because *Section 203* does not merely compel [the defendant employer] to restore the

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[12] § 201 requires employers to provide employees with immediate wage payments following a discharge or layoff. § 203 imposes penalties in the form of wage continuation payments for up to thirty days for violations of § 201. Similarly, § 226(a) requires employers to provide employees with accurate itemized wage statements by describing certain information (e.g., total hours worked, gross wages earned, etc.) and § 226.6 imposes penalties of up to $1,000 for violations of § 226(a). The statutory penalty provided by § 226.6 may be imposed only after an employer has been convicted of a misdemeanor for violating § 226(a).

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status quo ante by compensating Plaintiffs for the time they worked; rather, it acts as a penalty by punishing [the defendant employer] for willfully withholding the wages and forces [the defendant employer] to pay Plaintiffs an additional amount." *Id.* at 895. Plaintiffs' reference to § 203 should therefore be stricken from the fifth cause of action.

Plaintiffs' reference to § 226.6 should be stricken for similar reasons. § 226.6 classifies violations of § 226(a) as misdemeanors in California and imposes a financial penalty *after* a conviction is obtained. The relief therefore is not intended to compensate Plaintiffs for work the Plaintiffs performed. The financial penalty cannot, therefore, be considered restitutionary under *Tomlinson*.[13]

For the reasons described above, the penalties described in §§ 201 and 226.6 are immaterial or impertinent to Plaintiffs' fifth claim for relief and should, therefore, be stricken from the Complaint. *Fantasy, Inc*, 984 F.2d at 1527.

b. The Court Should Strike Plaintiffs' Request For A Temporary Restraining Order, A Preliminary Injunction And An Order To Show Cause From The UCL Prayer For Relief Because There Is No Risk Of Irreparable Harm.

Requests for injunctive relief, including requests for preliminary injunctions and temporary restraining orders, require Plaintiffs to "demonstrate a significant threat of irreparable injury." *See Givemepower Corp.*, 2007 U.S. Dist. LEXIS 20886 at*20 (denying request for a preliminary injunction and temporary restraining order) (citing *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (citation omitted). Moreover, "[e]conomic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." *Id.* (citing *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however

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[13] In addition, the Complaint fails to allege that Defendant Dollar Tree, or any of its officers, directors or managing agents, were ever accused, much less convicted, of misdemeanor violations of § 226(a). *See Compl.*, ¶ 56. The references to § 226.6 therefore lack a factual predicate and should be stricken on this independent basis.

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substantial, in terms of money, time and energy necessarily expended are not enough" to constitute irreparable injury) (quotation omitted).

As described above, Plaintiffs' UCL Prayer for relief seeks a temporary restraining order, an order to show cause and a preliminary injunction enjoining Dollar Tree "from failing to pay overtime wages, withholding taxes, matching funds, Social Security, Medicare, unemployment and workers' compensation premiums as required by law" (*Compl.*, at Prayer, p. 24, ¶¶ 19-20). These allegations, which describe quantifiable and readily ascertainable sums certain, are financial and plainly compensable. Because Plaintiffs threatened injuries can be remedied through awards of actual damages and/or restitution,[14] their requests for preliminary injunctive relief, an order to show cause and for a temporary restraining order are immaterial and impertinent and should be stricken from the Complaint pursuant to Rule 12(f).

3. The Court Should Strike Plaintiffs' Reference To IWC Wage Order No. 9

IWC Wage Order No. 9 regulates "wages, hours and working conditions in the transportation industry." *Watkins v. Ameripride Servs.*, 375 F.3d 821, 825 (9th Cir. 2004). Plaintiffs allege that Dollar Tree was at all times "engaged in the business of maintaining retail stores for the purpose of selling to the general public discounted household products and miscellaneous merchandise." *Compl.*, ¶ 55. Because Dollar Tree's alleged business is in the retail services industry and not the transportation industry, Plaintiffs' reference to IWC Wage Order No. 9 (*see Compl.*, at p. 9:4) should be stricken on the grounds that it is immaterial and impertinent to any cause of action alleged in the Complaint.

[14] Plaintiffs seek actual damages for these injuries through their sixth and seventh claims for relief. *See Compl.*, at Prayer, ¶¶ 23 (seeking "actual damages") and 26 (seeking an order "requiring Defendant to restore to Plaintiffs and members of Plaintiffs' Class all wages and other property withheld unlawfully by Defendant."

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IV. CONCLUSION

Plaintiffs have made a federal, class-action case out of, at best, an isolated belief about activity in Sonoma County. This lawsuit should not go forward as a class action unless and until Plaintiffs can marshal facts supporting their conclusions.

DATED: July 9, 2007

Respectfully submitted,

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